Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 04-227

REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") hereby submits its Reply Comments in response to the above-captioned Notice of Inquiry released by the Commission on June 17, 2004.[1] EchoStar addresses three issues in particular. First, contrary to the assertions of the cable industry in this proceeding, cable has maintained its advantage in the multichannel video distribution ("MVPD") market. Truly effective competition has not yet been achieved. Second, the service bundling practices that the cable industry touts as having pro-consumer benefits (essentially, the packaging of cable programming with high-speed access) may also further entrench cable's power. Finally, EchoStar reemphasizes the risks to competition from an even more pernicious form of bundling – tying of must-have broadcast or cable programming to new cable networks on the part of powerful programmers. The Commission must not lose sight of these serious threats to attainment of a truly competitive market.

[1] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227 (rel. June 17, 2004) ("Notice" or "NOI").

I. CABLE OPERATORS STILL DOMINATE THE MVPD MARKET

The cable industry asserts that the MVPD market is characterized by "vigorous rivalry," and requests the Commission to make such a finding.[2] This assertion is no different from the argument, made by the cable industry in prior years, that the MVPD market is "fully competitive."[3] Because the MVPD market is undeniably not characterized by full competition, the Commission has previously declined to accede to the cable industry's demand to declare the market fully competitive, and should do so again.

The cable industry's assertions of full competition, little more than *ipse dixit* to begin with, are belied by two fundamental and incontrovertible facts. *First*, cable operators still possess enormous market power. According to the National Cable and Telecommunications Association's ("NCTA") own comments, cable still possesses 73.30% of the MVPD market as of April 2004, down from 74.87% of the market last year. This fact alone is enough to render absurd any notion that the cable industry lacks market power, let alone that it lost its power in one year. Furthermore, when the rate of decline in the cable industry's market power is considered, it is apparent that cable is maintaining, if not improving, its ability to defend its competitive advantage. In 1998, cable had 85.34% of the MVPD market; in 2003, it had a 74.87% share—a 10.5% decline over the previous five years, or about 2.1% annualized.[4] In the most recent 10-month period, by comparison, cable has experienced a 1.57% decrease—an annualized 1.88% rate. The still massive market share of cable, and the slow (if not declining)

---

[2] *See* Comments of the National Cable and Telecommunications Association (dated July 23, 2004) at 1 ("NCTA Comments").

[3] *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1621 ¶ 21 (2004) ("*Tenth Annual Report*").

[4] *See Tenth Annual Report*, 19 FCC Rcd. at 1609 ¶ 6.

rate of decrease in that share, demonstrate that a fully competitive market has not yet been achieved.

Second, and equally important, cable prices continue to rise at a rate far in excess of inflation. The Commission recognized in the most recent video competition report that, over the period 1993 to 2003, the rate of cable increases was more than double the rate of increases in the Consumer Price Index.[5] These runaway price hikes demonstrate that non-cable competitors are still not disciplining cable prices. The NCTA's monotonous repetition of the healthy growth of cable alternatives does nothing to change the fact that cable can and does continue to wield power far in excess of what it could in a truly competitive marketplace.

The cable industry ignores these facts, relying instead on anecdotes and projections of future competition. In particular, the cable industry places far too much reliance on future services that may—at some point, but not currently—offer significant competition to cable operators. For example, Comcast points to the recent auction of licenses for Multichannel Video Distribution and Data Services ("MVDDS"). MVDDS, however, does not currently compete with cable, nor will it do so in the short term.[6] There has been no launch of MVDDS in the United States. To the extent that MVDDS may increase competition to the MVPD market, the benefits of such competition will not occur for some time. The NCTA similarly relies on "announcements" and "indicat[ions]" that non-cable operators are planning to offer, or are

[5] *Tenth Annual Report* at 1610-11.

[6] The Commission's orders in the MVDDS proceeding are currently on appeal to the Court of Appeals for the District of Columbia Circuit. *See Northpoint Technology, Ltd. v. FCC*, Nos. 02-1194 *et al*. As it did before the Commission, EchoStar has argued on appeal that MVDDS will cause significant interference to DBS signals.

"beginning" to offer, various services.[7] The Commission should wait to see what happens before finding that these services equate with effective competition in the MVPD market.

Given the current state of cable's market power, the industry's argument—that increasing competition means that several existing pro-competition regulations are no longer necessary—is misplaced. In fact, cable has it exactly backwards. Contrary to cable's arguments, rolling back regulations designed to spur competition will have the predictable result of reversing what slight gains may already have been achieved and cementing cable's ability to continue to raise its prices. For example, Comcast argues that the Commission should eliminate or modify the program access rules prohibiting exclusive contracts between vertically integrated programming vendors and cable operators.[8] This would be an enormous mistake. Vertically integrated programmers retain the incentive to favor affiliates over nonaffiliated MVPDs. Comcast's ability to raise its prices to consumers would be increased exponentially if it could have exclusive rights over additional must-have programming (beyond its exclusivity over its regional sports networks, which has already caused significant damage to MVPD competition in geographic markets such as Philadelphia). There is simply no reason for the Commission to lower its guard against such anticompetitive conduct. Rather than eliminating the rules, the Commission should more vigorously enforce them. As EchoStar and numerous commenters have argued, for example, the Commission should apply the unfair practices prohibition to strike at practices such as bundling and to narrow the terrestrial loophole that has permitted vertically integrated programmers to evade the program access exclusivity ban.

---

[7] *See* NCTA Comments at 20 (stating that "SBC recently outlined plans to deliver video services over an upgraded phone network") (internal quotation omitted); *id.* at 18-20 (reciting plans for other bundled offerings by non-cable MVPDs).

[8] *See* Comments of Comcast Corporation (dated July 23, 2004) at 42 ("Comcast Comments").

Similarly, EchoStar urges the Commission to see the folly of Comcast's argument that spectrum eligibility restrictions should not be applied to cable.[9] The Commission has been correctly concerned with the threat to competition that would be posed by allowing cable operators to participate in certain auctions of spectrum.[10] Nothing has changed that should cause the Commission to revisit this issue at this time.

Finally, there is no reason for the Commission to loosen the requirements that must be met for a finding of "effective competition" under the Communications Act. In fact, Comcast's specific recommendation—that effective competition should be presumed in any state where DBS penetration is over 15%, and that a petition should be granted without a finding of effective competition whenever it is unopposed[11]—is flatly inconsistent with the requirements of the law. But even if it were not, a state-wide percentage ignores potentially huge discrepancies within the state. Both Congress and the Commission have defined the relevant geographic market on a cable franchise basis, and state-wide penetration rates are not a suitable tool for assessing competition in such a market. As Comcast has vastly overstated the overall level of competition in the MVPD market, it is imperative that the Commission continue analyzing competition on a market-by-market basis before making a finding of effective competition.

---

[9] *See* Comcast Comments at 43.

[10] *See, e.g., In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096, 4208 (2000).

[11] *See* Comcast Comments at 40-41.

II. CABLE'S SO-CALLED PRO-COMPETITIVE PRACTICES MAY FURTHER ENTRENCH ITS POWER

The cable industry also argues that the industry's recent efforts to bundle packages of video, voice and broadband internet services are evidence of full competition in the MVPD market. EchoStar does not dispute that packaging in general can have pro-competitive effects in the absence of market power. But the problem here is that cable has used its market power over video distribution to leverage itself into broadband, and may now be doing the reverse: using its acquired prevalence over broadband (a reported 58.3% share of "high-speed lines," and 75.3% of "advanced services," at the end of 2003) to further cement its position in the video distribution business.[12] This two-way use of leverage is doubtless a win-win for cable, but it is a loss for competitors in either service (competing MVPDs, competing high-speed access providers) and for consumers. It is particularly detrimental to MVPD competition because of the bandwidth shortage that impedes cable's main competitor – DBS. The DBS spectrum is scarce to begin with, and it is only one-way, not allowing broadband service. While EchoStar has been making concerted efforts to alleviate that handicap, to date cable operators remain essentially unrivaled in their ability to seamlessly bundle a product over which they have traditionally had market power with a product over which they have recently acquired leverage by virtue of that power.

Cable operators are also beginning to bundle voice telephony services with broadband and programming services, and can price such bundles aggressively to gain

[12] *See High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (June 8, 2004) (Charts 2 and 4). The term "high-speed" is used by the Commission to describe services that provide the subscriber with transmissions at a speed in excess of 200 kilobits per second (kbps) in at least one direction. The Commission refers to "advanced services" as services that provide the subscriber with transmission speeds in excess of 200 kbps in each direction, and are a subset of high-speed services. *See id.* at 1 n. 1.

consumers or maintain market share. Cablevision, for example, recently extended a promotional offer that combines cable TV, internet, and phone service for $90 a month. Voice telephony is another service that DBS providers are simply unable to offer by themselves as part of a package, making it that much more difficult for DBS to offer head-to-head price and quality competition to cable. In addition, customers won over by cable because of a video/high-speed access/voice bundle tend to be "sticky" because they are unwilling to lose the convenience of one-stop shopping for these services. Such increased stickiness may well augur a slowing down of any further decreases in cable market share, or even a reversal of that trend. This, in turn, further militates against any premature conclusion that effective competition in the MVPD market has descended upon the entire country.

III. THE BUNDLING OF PROGRAMMING BY MEDIA CONGLOMERATES PRESENTS SERIOUS RISKS TO COMPETITION

Fox Cable Networks Group argues in this proceeding that the bundling of programming results in pro-competitive efficiencies and consumer benefits.[13] As EchoStar has also argued in the "a la carte" docket, the Commission should be very skeptical of these assertions by large media conglomerates for a simple reason: bundling produces no consumer benefits whatsoever in situations where a seller with market power over a popular product also forces its unwanted products on buyers.[14] Bundling practices and penetration requirements on the part of powerful programmers hamper distributors from offering a la carte or tiered options.

---

[13] *See* Comments of Fox Cable Networks Group (dated July 15, 2004) at 2-25 ("Fox Comments").

[14] *See* Comments of EchoStar Satellite L.L.C. (dated July 15, 2004) MB Docket No. 04-207; *Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, DA 04-1454 (rel. May 25, 2004).

EchoStar urges the Commission to vigorously use the tools at its disposal to check these practices, consistent with the Commission's long-standing pro-competition policies.

In addition to other practices that result in bundling at the consumer level, Fox argues that the bundling of retransmission consent with affiliated cable programming has generated economic efficiencies and fostered the growth of new and diverse programming.[15] But the truth of the matter is that entities that control local broadcast network programming can use their market power to impose onerous bundling requirements on MVPDs—for instance, the carriage of affiliated cable programming that the MVPD would not otherwise carry, or the inclusion of affiliated cable programming in particular packages. The retransmission of local network stations is a must-have for distributors. There is no reason for the Commission not to enforce the retransmission consent law in a manner consistent with antitrust principles, which prohibits these types of tying arrangements in the presence of market power. The Commission confirmed the market power of Fox's parent, News Corp., in the context of retransmission consent, just this past year;

> News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations. Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult.[16]

The Commission should make clear that the bundling of retransmission consent, in the presence of market power, is anti-competitive and prohibited.

---

[15] *See* Fox Comments at 21-23.

[16] *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd. 473 ¶ 201 (2004).

Similarly, the Commission should clarify that vertically integrated programmers could violate the program access law's proscription of unfair practices if they bundle popular channels with undesirable channels, forcing the MVPD to acquiesce or attempt to compete without the popular channel in its lineup. This practice can have the effect of significantly hindering MVPDs' efforts to compete, and can therefore be within the ambit of ¶ 628(b) of the Communications Act. *See* 47 U.S.C. § 548(b). The Commission should vigilantly enforce that prohibition.

IV. CONCLUSION

EchoStar urges the Commission to take the foregoing reply comments into account in its next annual report on the status of competition among MVPDs.

Respectfully submitted,

/s/ John D. Clopper
Pantelis Michalopoulos
John D. Clopper
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

David K. Moskowitz
Senior Vice President
and General Counsel
EchoStar Satellite LLC
9601 S. Meridian Blvd.
Englewood, CO 80112

Karen E. Watson
Lori Kalani
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

August 25, 2004